AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration	:	
	:	AAA Case No.
between	:	01-14-0000-4440
	:	
CITY OF PHILADELPHIA,	:	Opinion & Award
	:	
"City"	:	Re: Discharge of
	:	Steven Lupo
- and -	:	
	:	Hearing: December 4, 2017
F.O.P, LODGE NO. 5,	:	
	:	
"Union"	:	

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Frank E. Wehr, Esq., Assistant City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc L. Gelman, Esq., Of Counsel

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer Steven Lupo, effective April 7, 2014. It took this action based upon a finding that he had twice violated Department Disciplinary Code, Article I - Conduct Unbecoming, Section 1-§010-10, by knowingly and willfully making a false entry in a Department record or report. The two instances at issue concern vehicle investigations conducted by Lupo on September 25, 2010 August 5, 2011.

The Union contends the City lacked just cause to discharge Lupo. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that all references to the discharge be expunged from Lupo's personnel file to the maximum extent permitted by law.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly.

Lupo's Employment History

At the time of his discharge, Lupo had been a member of the Department for over six years. The record does not reflect that he had any prior discipline. (City Exhibit 1.)

During the time period relevant here, Lupo was assigned to the 14th District, which he described as being "very busy." In that assignment, he worked 5-squad, a tactical unit that focuses on major crimes and does not respond to regular radio calls. By virtue of this focus, the 5-squad, according to Lupo, produced more arrests than achieved by the District's other squads, with many of them involving narcotics charges.

In his testimony, Lupo related that the 5-squad's high arrest rate resulted in substantial court time for the officers assigned to it. In his case, he described appearing in

court virtually every day, including his days off, for preliminary hearings, suppression motions and trials. He reported having as many as thirteen hearings in a single day.

According to Lupo, he rarely had an opportunity to prepare in advance for court appearances. Instead, he described the preparation process as involving a brief meeting with the assigned assistant district attorney on the day of the hearing followed by a review of the relevant documents in the case file, which often included, among others: Form 75-48 – Complaint Incident Report; Form 75-48A – Vehicle/Pedestrian Investigation Report; traffic citation; and detectives' memos. He stated that with the volume of arrests made, he often had no recollection of the facts underlying a scheduled case until refreshing his memory by reviewing the documents.

Internal Affairs Investigation

The circumstances that led to Lupo's discharge began with a November 1, 2011 email that the Department received from a local journalist, alleging that Lupo had committed perjury in testifying regarding the August 5, 2011 vehicle investigation at a subsequent suppression hearing in defendant A[redacted] F[redacted] case. In particular, the journalist reported that Lupo's testimony regarding whether he had opened the trunk of F[redacted] automobile before securing a warrant was inconsistent with a security video showing his actions during the investigation and arrest. (City Exhibit 1.)

While the Internal Affairs Division ("IAD") was investigating the journalist's allegation, the Department received a second report regarding Lupo. On March 1, 2012, a Philadelphia assistant district attorney advised that Lupo may have fabricated evidence during the September 25, 2010 vehicle investigation and arrest and later committed perjury by testifying regarding such evidence at hearings held in connection with the

criminal charges brought against defendant T[redacted] J[redacted]. The evidence at issue concerned Lupo's documentation of the investigation, which reported that the windows of J[redacted] vehicle had illegal limo tint. (City Exhibit 1.)

F[redacted] Matter

Detective Timothy Thompson, a member of IAD, testified that on March 1, 2012, he was assigned to investigate Lupo's actions in the F[redacted] matter.[1]

According to Thompson, his investigation revealed that on August 5, 2011, Lupo and his partner, Police Officer J[redacted] C[redacted], stopped a vehicle being driven by F[redacted] because he had disregarded a stop sign. Upon approaching the vehicle, Lupo observed F[redacted] stuffing a clear bag, which appeared to contain marijuana, into his pants pocket. Lupo and C[redacted] also noticed suspicious movements by F[redacted] three passengers and detected a strong odor of marijuana emanating from the trunk of the vehicle.

In response, Thompson's investigation showed, Lupo called for a supervisor and requested that the Department's Narcotics Field Unit ("NFU") obtain a warrant to search the vehicle. A member of the Pennsylvania State Police K-9 unit also responded to the scene with a drug-sniffing dog. During a perimeter check of F[redacted] vehicle, the dog "alerted" on the trunk area and front driver-side door, indicating the presence of illegal drugs.

Thompson recounted further that his investigation included a review of the Form 75-49 Department Investigation Report prepared by Police Officer J[redacted] M[redacted], the NFU member that secured the warrant requested by Lupo and responded to the scene of

[1] Thompson's investigation report reflects that this matter was initially assigned on November 1, 2011 to Lieutenant Daniel Bartlett of IAD. In addition, his report indicates that on November 30, 2011, the Department referred the investigation for review to the Federal Bureau of Investigation's Philadelphia Inter-Governmental Public and Police Corruption Task Force, to which Thompson was then detailed.

the vehicle stop. This report, he noted, confirmed: the details of the vehicle stop, including Lupo and C observations; the results of the K-9 unit's perimeter check; and the execution of the warrant, which involved transporting F automobile to an NFU location, where a search resulted in the discovery and seizure of various items containing marijuana.[2] M report, however, did not reference that Lupo had opened the trunk of F automobile following the vehicle stop, but prior to the warrant being secured. (City Exhibit 2.)

Thompson also related reviewing a video recorded by an area security camera depicting this August 5, 2011 vehicle stop and investigation. (City Exhibit 11.) The video, he reported, showed that prior to the K-9 check and M receipt of the warrant, Lupo and Sergeant L M, the supervisor at the scene, approached the vehicle and opened the trunk for a brief period.[3]

Thompson continued that the transcript of an October 18, 2011 suppression hearing in F case showed that during cross-examination by defense counsel, Lupo initially denied opening the trunk of F vehicle before the arrival of the K-9 unit. (City Exhibit 3, pg. 28.) However, after the attorney played the security video, Lupo recalled opening the trunk at M direction. Addressing his prior answer on this

[2] Thompson's investigation confirmed that F was charged criminally with several narcotics violations based upon the marijuana seized from his vehicle and found on his person. (City Exhibit 1.)

[3] In regard to the content of this security video, the parties stipulated to the following: (1) the duration of the stop, including the attendant investigation and arrests of F and his passengers, was approximately one hour and forty minutes; (2) the opening and inspection of the trunk by Lupo and M was completed in approximately 30 seconds; and (3) Lupo and M were only individuals in the immediate vicinity of the vehicle at the time of that inspection, during which M appears to place his hands in the trunk while conversing with Lupo. (City Exhibit 11.)

subject, he stated, "I totally forgot about (sic.) he asked me to open it at one point . . . to make sure there were no guns." (City Exhibit 3, pg. 39.)[4]

In his testimony regarding this matter, Lupo confirmed the circumstances of the August 5, 2011 traffic stop (i.e., F disregarded a stop sign), as well as the subsequent observations that resulted in the detention of F and the three passenger's in his vehicle. He also recounted contacting NFU to obtain a search warrant for the vehicle and calling for a supervisor. M, he stated, was the supervisor that responded to his call and arranged for the K-9 unit that performed the perimeter check of the vehicle.

Before the K-9 unit arrived, he recalled discussing F vehicle with M, including, in particular, that it had an opening in the rear seat affording passengers seated there access to the trunk. In response, M, he averred, stated that they would need to make a safety check of the trunk for the possible presence of weapons or explosives, as they would not be detected by the K-9 unit.[5] As a result, he and M opened the trunk and made a brief observation of its contents. In reviewing the video recorded of this scene by an area security camera, he verified that he and M are the two individuals that are depicted opening and looking inside the trunk of F s vehicle. (City Exhibit 11.)[6]

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[4] Thompson's investigation of the F matter also included interviews of M and C. Thompson stated that these interviews were deferred until after the completion of the related grand jury proceeding in April 2014, which cleared both M and C of any criminal wrongdoing related to the F matter. Neither M nor C testified at the hearing before me in this case.

[5] Lupo averred that although all occupants had been removed from the vehicle, a safety check was still required at that time. This need, he explained, stemmed from the fact that once the warrant was obtained, it would be necessary for him or C to drive the vehicle from the scene to an NFU location, where the search would be performed.

[6] Lupo reported being aware of the presence of this particular security camera from prior arrests that he had affected at that location.

He recounted that some time after making the trunk inspection, the K-9 unit arrived followed by M[redacted], who eventually secured the warrant for the vehicle. According to Lupo, M[redacted] never instructed him to inform M[redacted] of the trunk inspection. He reported not doing so on his own initiative because it did not seem relevant, having simply involved a quick safety check. He explained that his duty to communicate with M[redacted] involved providing the details of the vehicle stop and his subsequent observations, which constituted the evidence of probable cause needed to obtain the search warrant.

M[redacted] presence and the lack of any other specific direction from him, he stated, contributed to this view of his duty. In explaining this deference, he pointed out that in addition to being a supervisor, M[redacted] had considerable tenure with the Department and previously worked in NFU.[7]

Addressing F[redacted] October 18, 2011 suppression hearing, Lupo reported looking at the case file that day for the first time since the arrest ten weeks earlier. He stated further that in testifying on cross-examination, he initially understood the questions asked by F[redacted] attorney as focusing on whether there had been a "search" of the trunk before the arrival of the K-9 unit. However, when shown the video, he averred recalling that he and M[redacted] had opened the trunk for the safety inspection and acknowledged having done so. (City Exhibit 3, p. 28.) He denied attempting to conceal this fact. Explaining his failure to mention it prior to being shown the video, he said, "I completely forgot."

[7] On cross-examination, Thompson confirmed that M[redacted]y had been a corporal assigned to the NFU, and, as a result, was knowledgeable regarding vehicle stops involving narcotics possession. He stated further that as the supervisor at the scene, M[redacted] had the authority to direct Lupo's actions. He also related that when interviewed on May 6, 2014, M[redacted] recounted instructing Lupo to open the trunk of F[redacted] vehicle for safety reasons because "[he] was concerned that [one of the passengers] could have put something dangerous or volatile in the trunk." (Union Exhibit 1, p. 4.) M[redacted] also informed Thompson that he had subsequently directed Lupo to notify M[redacted] that the trunk had been opened. (Union Exhibit 1, p. 5)

J[redacted] Matter

In recounting his work on the J[redacted] matter, which involved the September 25, 2010 vehicle investigation conducted by Lupo and his then partner Police Officer J[redacted] L[redacted],[8] Thompson indicated that the focus concerned Lupo's report and subsequent testimony that the vehicle's windows were illegally tinted. He related reviewing various documents that Lupo had prepared in connection with this matter (i.e., Form 75-48A – Vehicle or Pedestrian Investigation Report; Traffic Citation), as well as the Form 75-48 – Complaint or Incident Report completed by L[redacted]. (City Exhibit 4.)

He highlighted that the Form 75-48A included a description of the vehicle's windows as having "sunscreen prohibited all 4 windows and rear . . . had limo dark tint." Similarly, the traffic citation identified the offense as "sunscreen prohibited" and specified: "full limo tint, all 4 windows and rear windshield." He noted, however, that the Form 75-48 prepared L[redacted] did not include any reference to the tinting of the vehicle's windows. (City Exhibit 4.)

According to Thompson, his document review also included an examination of the transcripts of Lupo's testimony at the November 16, 2010 preliminary hearing and September 22, 2011 suppression hearing conducted in J[redacted] case. (City Exhibits 6-7.) He pointed out that in testifying at the first hearing, Lupo, in describing J[redacted] vehicle, stated, "It had four tinted, heavily tinted windows, like limo tinted. The rear window was also tinted. We could not see inside the vehicle." (City Exhibit 6, pp. 5-6.) Similarly, at the second hearing, Lupo averred, "There was very heavy limo tint on all four windows . . . ." (City Exhibit 7, p. 8.)

[8] L[redacted] was subsequently promoted to detective.

Addressing his investigation of the subject vehicle, Thompson reported finding that it had been rented from Avis Rent A Car ("Avis") by J girlfriend, R M at approximately 5:15 p.m. on September 24, 2010. He related further that Avis representative S C confirmed that the vehicle did not have limo-tinted windows at the time it was rented to M, nor when it was returned to Avis. (City Exhibit 7, p. 79.)

In attempting to physically inspect the vehicle as part of his investigation, Thompson learned that Avis had disposed of it at a 2011 auction, where it was purchased by dealership, which, in turn, subsequently sold it to an individual residing in Virginia. According to Thompson, when FBI special agent Christian Pettyjohn inspected and photographed the vehicle at his direction in March 2012, its windows did not have limo tint. (City Exhibit 9.)[9]

Addressing the circumstances of the September 25, 2010 vehicle investigation, Thompson recounted that at approximately 12:45 a.m. that morning, Lupo and L approached J automobile, which was parked in front of a Chinese restaurant in a high crime area. They did so, he explained because the vehicle was idling and appeared to be unoccupied. In doing so, he stated, they discovered that J was present in the vehicle along with a passenger, A H. Their observations as J exited the vehicle led to the arrest of both J and H on various narcotics charges.

Finally, he averred that during his Internal Affairs interview, L confirmed this account of the September 25, 2010 vehicle investigation, including the

[9] Thompson also reported securing various documents, all of which reflected that the vehicle's windows did not have limo tint. These documents included: (1) M Avis rental agreement; (2) Avis's repair and maintenance record for the vehicle; and (3) the purchase invoice for the vehicle, which is commonly referred to as the "window sticker." (City Exhibit 8.)

reason that he and Lupo approached J[redacted] automobile.[10] L[redacted] also explained that he understood the term "full limo tint" as referring to black out tint that precludes visibility through a vehicle's windows to which it has been applied. As to J[redacted] vehicle, L[redacted] could not recall how dark the windows were, but believed he had been able to see into the interior by looking through the windows.

L[redacted], in his testimony here, gave a substantially similar account. On cross-examination, he confirmed having no recollection whether the windows of J[redacted] vehicle had a level of tint less than "full limo." When questioned regarding his failure to observe H[redacted] presence in the front seat of the vehicle until a few minutes after he had approached the front-passenger side door, he related that it could have been due to the window tint or the absence of sufficient street lighting in that location at 12:45 a.m.

He also testified that in his capacity as police officer, he has seen vehicles with temporary tint applied to the windows. In the case of rental vehicles, he noted that the temporary tint is typically applied after the vehicle is received from the rental company and removed prior to its return. Addressing the relationship between window tint and criminal conduct, he stated that it is employed to prevent police officers from observing illegal activity taking place within the subject vehicle. He recalled supervisors in the 14th District notifying him and other officers to be alert to vehicles with heavily tinted windows, as they were being used in robberies.

In his testimony, Lupo also verified that the investigation of J[redacted]'s automobile stemmed from the fact that it was idling and appeared to be unoccupied. He recounted

[10] Thompson conducted his interview of L[redacted] on May 21, 2014. He explained that as with the interviews of M[redacted] and C[redacted], his interview of L[redacted] was deferred until after the completion of the related grand jury proceeding in April 2014, clearing L[redacted] of any criminal wrongdoing in connection with the J[redacted] matter. (City Exhibit 1.)

further that the tint on the vehicle's windows prevented him from observing H presence in the front seat as he approached the vehicle. According to Lupo, he first noticed her when J opened the front driver's side door of the vehicle, at which time he alerted L of her presence.

Addressing the related documentation, including, in particular, the Form 75-48A, he stated that this matter did not involve a vehicle stop, as J automobile was parked at the time. He explained, however, that an arrest associated with a vehicle investigation, as occurred here, requires the completion of this form. The inclusion of a reference to the traffic citation issued for illegal tint in the "Vehicle Stop" box of the form, he stated, reflects that there is no other place on the document to the list that information. According to Lupo, he believed it was important to include a reference to the traffic citation on the form, so as to ensure a proper trail linking all of the documents associated with this matter.

Lupo also identified an arrest memo that he prepared regarding this vehicle investigation. It too, he noted, indicates that he and L approached J vehicle was because it was idling and appeared to be unoccupied. (Union Exhibit 2.)

Regarding the use of automobile window tint, he related that his experience as a police officer has shown that it is often employed to conceal illegal activity taking place within a vehicle. For this reason, he averred, it is common for persons engaged in illegal drug sales to rent vehicles and apply temporary tint to the windows. In the case of J automobile, he recalled, the tint appeared to be an "inexpensive do it yourself job," which could be easily removed.

Criminal Prosecution of Lupo

Thompson testified that in or about January 2014, the Philadelphia District Attorney convened a grand jury and secured a criminal presentment against Lupo, which was unsealed on March 7, 2014. The presentment, he stated, charged Lupo with perjury and four other related criminal offenses in connection with both the F[redacted] and J[redacted] matters for a total of ten charges. (City Exhibit 10.)[11]

Sybil Murphy, Deputy District Attorney, Investigation Division, confirmed that following a preliminary hearing, the case against Lupo was sent to trial on all ten charges. Subsequently, she stated, the trial judge ordered that the charges for the two matters be tried separately. In response, Murphy related, in June 2015, the district attorney proceeded to trial on the charges relating to the F[redacted] matter, which concluded with a not guilty verdict on all five counts.

Subsequently, she stated, the court dismissed the charges relating to the J[redacted] matter, effective June 29, 2016, due to the prosecution's failure to comply with the governing speedy trial rule. This dismissal, she explained, stemmed from the trial judge's decision to order separate trials, and the district attorney's inability to proceed with the second case until the court issued an order establishing a separate docket number for it. She confirmed that while the district attorney's office challenged the dismissal, it discontinued that appeal as of June 9, 2017.

[11] The presentment charged Lupo with the following criminal acts in connection with both matters: (1) Title 18 Pa. C.S. 4902 - Perjury; (2) Title 18 Pa. C.S. 4903 – False Swearing in Official Matters; (3) Title 18 Pa. C.S. 4906(a) – Unsworn Falsification; (4) Title 18 Pa. C.S. 4906(b) – False Reports to Law Enforcement; and (5) Title 18 Pa. C.S. 5101 – Obstructing Administration of Law. (City Exhibit 10.)

Findings of Internal Affairs' Investigation

Thompson testified that he completed his investigation of the F and J matters in or about August 2014. He reported concluding that in both matters, Lupo had knowingly and willfully filed false reports. The conclusion that Lupo's misrepresentations in these matters constituted intentional falsehoods, he explained, rested on considering the two cases together. He averred that standing alone, Lupo's failure to report the trunk inspection in the F matter could have been inadvertent. However, when weighed together with the obvious misrepresentation regarding the window tint in the J matter, it caused him to find that Lupo had intentionally made false reports in both cases.[12]

Decision to Discharge Lupo

On April 7, 2014, by decision of then Police Commissioner Charles Ramsey, the Department discharged Lupo for violating its Disciplinary Code, Article I - Conduct Unbecoming, Section 1-§010-10, making a false entry in any Department record or report. (Joint Exhibits 2-3.) Current Commissioner Richard Ross, a Deputy Commissioner as of April 2014, testified to being familiar with the circumstances underlying this case, and confirmed that former Commissioner Ramsey took this action in response to Lupo's falsification of Department records in both the F and J matters.

Ross averred further that when certain criminal charges are brought against a police officer, immediate dismissal is necessary. He cited perjury as an example of a

[12] Thompson's investigation also yielded findings as to M and L r. Specifically, he concluded: (1) M did not violate Department policy in directing the safety inspection of the trunk of F vehicle; and (2) L r neglected his duties by failing to review for truth and accuracy the documentation that Lupo prepared relative to the September 25, 2010 vehicle investigation. (City Exhibit 1.)

criminal charge warranting such action. A perjury charge, he explained, undercuts a police officer's ability to testify in court, and thus, renders him/her unfit for duty. Stated otherwise, he said, an officer charged with perjury could not be assigned any duties that might require him/her to appear as a witness for the district attorney. For this reason, he related, the Department, as a matter of practice, will not reinstate an officer discharged on this basis unless and until the criminal charges have been resolved without a finding of guilt, and often, only if directed to do so pursuant to an arbitration award.

Procedural History

Lupo's discharge prompted the instant grievance. When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to the procedures of their collective bargaining agreement (the "Agreement"), the parties selected me to hear and decide this case. (Joint Exhibit 1.)

I held a hearing in this matter on December 4, 2017, at the offices of American Arbitration Association in Philadelphia, Pennsylvania. At that time, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I held the record open to allow the parties an opportunity to provide me with copies of certain exhibits identified and entered into the record during the hearing. Upon the receipt of those exhibits, I declared the record closed as of December 21, 2017.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer Steven Lupo, effective April 7, 2014?

2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Lupo was for just cause. It maintains that the evidence conclusively demonstrates that he violated Department Disciplinary Code Section 1-§010-10 in two instances, for which discharge was the appropriate penalty.[13]

Addressing the F[redacted] matter, it highlights that record here substantiates that Lupo gave false testimony at the October 18, 2011 suppression hearing in that case. Lupo, it stresses, has conceded that he testified falsely by initially denying opening the trunk of F[redacted] automobile during the August 5, 2011 vehicle stop. As such, it concludes, the only issue to be determined is whether he did so willfully.

It argues that on the established record, the question must be answered in the affirmative. The evidence presented, it avers, confirms that Lupo's false statement did not stem from a lapse of memory, but represented a conscious decision on his part. Indeed, it reasons, a full review of the details of the August 5, 2011 stop of F[redacted] vehicle, including, in particular, the circumstances surrounding the trunk inspection, makes plain that the opening of the trunk was too memorable an event for Lupo to have forgotten. Stated otherwise, it asserts, Lupo's false testimony in F[redacted] case cannot be

[13] Anticipating the Union's argument, the City contends that no basis exists under the Agreement to elevate the standard of proof in this case from a preponderance of the evidence to beyond a reasonable doubt. It asserts further that such argument is undercut by the reason for Lupo's discharge, which was the making of false Department reports, and not the commission of a criminal act.

chalked up to the challenges that police officers face in testifying accurately in court given the volume of cases handled and the limits of human memory. Simply put, it submits that on the proof presented here, the only reasonable inference that can be drawn is that Lupo knowingly and willfully testified falsely in denying that he had opened the trunk of F[redacted] vehicle during the August 5, 2011 vehicle stop and investigation.

Turning to the J[redacted] matter, it maintains that here too, the evidence substantiates that Lupo knowingly and willfully made false entries in Department reports. In this instance, he did so by falsely recording that the windows of J[redacted] automobile had "limo tint" at the time of the September 25, 2010 vehicle investigation. He then compounded that transgression by repeating this false report when he testified at the preliminary and suppression hearings in J[redacted] case.

In support, it points to the testimony of L[redacted], Lupo's partner for this investigation. It highlights that despite having personally observed Joseph's automobile on September 25, 2010, L[redacted] testimony provides no support for Lupo's claim that the windows had limo tint. In addition, it notes, L[redacted] included no reference to the windows having limo tint in any Department record that he prepared contemporaneous with the J[redacted] investigation. Moreover, in testifying, he reaffirmed that upon approaching Joseph's automobile on September 25, 2010, he was able to see through the windows into the vehicle's interior. In doing so, it submits, he confirmed that the vehicle's windows did not have limo tint, which would have precluded such visibility.

In sum, it contends that on the totality of the circumstances, the only conclusion that can be properly drawn is that the windows of J[redacted]'s vehicle did not have limo tint at the time of the subject investigation. As such, it necessarily follows that Lupo

knowingly and willfully made a false entry in a Department record by making a contrary report.

It continues that the outcome of the criminal charges brought against Lupo does not support a different finding here regarding his transgressions as to either the F[redacted] or J[redacted] matter. The jury's not guilty verdict on the charges relating to the F[redacted] matter, it reasons, cannot be deemed determinative of the matter to be decided in this case. It notes that in reaching such decision, the jury may have been influenced by a variety of factors wholly unrelated to Lupo's innocence, such as J[redacted] criminal activities. Likewise, it argues that the dismissal of the charges relating to the J[redacted] case is irrelevant to the determination of the issues here. Such dismissal, it points out, was made for procedural reasons having no bearing on the substantive validity of the charges.

As to the matter of penalty, it asserts that discharge was plainly warranted here. Referencing Commissioner Ross's testimony, it stresses the paramount importance of a police officer's credibility and, in turn, the Department's ability to trust the validity of the documentation that a police officer prepares in performing his/her duties. When a police officer breaches that trust and tarnishes his/her reputation by the knowing and willful making of a false Department report, it concludes, he/she ceases to be able to perform his/her duties as an officer and must be separated from employment.

In Lupo's case, it stresses, this breach of trust was extremely grave. His dishonesty was not limited to an isolated incident. Instead, it points out, the evidence reveals that he has engaged in a pattern of intentionally misstating the facts in his reports and then knowingly giving false testimony in court.

Accordingly, for all these reasons, the City asks that Lupo's discharge be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Lupo based upon his actions in the F[redacted] and J[redacted] matters. The Union submits that the City has failed to meet its burden of proof in this regard.

As a preliminary matter, it asserts that the City should be held to a heightened standard of proof given the nature of the charges brought against Lupo. It reasons that when an employer discharges an employee for alleged misconduct that amounts to criminal activity, or parallels criminal activity, as is the case here, the just cause standard obligates the employer to satisfy a higher level of proof in substantiating those charges. Namely, the employer must demonstrate the employee is guilty of the charged misconduct beyond a reasonable doubt, or, at least, by clear and convincing evidence.

The appropriateness of applying such higher standard, it avers, is further confirmed in the context of this case given the interrelationship between the Department's reasons for discharging Lupo and the criminal charges brought against him. In particular, it points out that per Thompson's testimony, once the Department refers an officer-involved complaint to the district attorney for possible criminal charges, any related Internal Affairs investigation is suspended until either the district attorney issues a declination to charge or the proceedings on the criminal charges brought have concluded.

Further, it avers that the Department's decision to discharge Lupo was driven by the district attorney securing a grand jury presentment of criminal charges against him. In support, it highlights that although the Department had maintained Lupo in a modified assignment (i.e., differential response squad) for over two years after learning of the

allegations of his perjury, the City proceeded with his discharge within just one month of the unsealing of the criminal presentment, and before the completion of the Internal Affairs investigation.

In sum, it concludes, notwithstanding reference to the falsification of Department records in the notice of termination, this sequence of events demonstrates the City discharged Lupo in response to the criminal charges. As such, it submits, the City should be held to the burden of proof associated with criminal charges; namely, the beyond a reasonable doubt standard.

Turning to the merits, it contends that City has failed to demonstrate that Lupo made a false entry in any Department record in connection with the F matter. As for his testimony at F suppression hearing, it argues that the surrounding circumstances preclude a finding that his misstatement regarding the trunk inspection constituted the knowing and willful giving of false testimony. In particular, L and Lupo's account of their routine high volume of court appearances for which preparation was limited to same-day file review months after the relevant events, it avers, compels the conclusion that his factual misstatement was a memory lapse, and not an intentional misrepresentation. Further, it maintains that in the overall context of the F vehicle stop, the trunk inspection was a minor matter as to which Lupo understandably did not have an immediate recollection.

Addressing the J matter, it stresses that the limo tint issue must be placed in context. It notes in this regard that Lupo and L decision to investigate J vehicle on September 25, 2010 stemmed from their observation that it was

idling and appeared to be unoccupied, and not because of limo tint.[14] The limo tint, it states, became an issue only after they had begun their investigation. As such, it concludes, Lupo had no motive to lie about the presence of limo tint on the windows of J[redacted] vehicle, as it was not the impetus for their investigation.

It argues further that all of the evidence regarding the condition of the vehicle at the time M[redacted] rented it, as well as after it was returned to Avis, is irrelevant. The record, it submits, clearly supports the finding that the limo tint reported by Lupo was a temporary application, which was removed prior to the vehicle being returned to Avis.

L[redacted] testimony, it contends, does not demonstrate otherwise. He did not deny the presence of tint on the windows of J[redacted] vehicle, but, at most, was unclear as to the degree of such tint. Further, it points out that his acknowledged inability to see H[redacted] within the vehicle as he approached lends support for the conclusion that the windows were tinted at limo level.

Finally, it asserts that the City's case fails because it rests on coupling the F[redacted] and J[redacted] matters. It notes in this regard that as Thompson averred, his conclusion that Lupo had knowingly and willfully made false entries here turned on considering the two cases together as showing a pattern of misrepresentation. As such, it explains, if the proof in either matter is found wanting as to the charge of an intentional misrepresentation by Lupo, then it necessarily follows that the City has failed to meet its burden of proof as to both. An examination of either matter separately, it maintains, reveals that such is the case.

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[14] *See* City Exhibit 7, pp. 24-25 (in testifying at the September 22, 2011 suppression hearing in J[redacted] case, Lupo stated, "I didn't pull alongside [J[redacted] vehicle] because of the tint. . . . I thought it was a parked vehicle running unattended.")

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

Opinion

This much is beyond dispute: the City's Police Department is certainly entitled to set an expectation obligating its officers to conduct themselves with rigorous honesty in all aspects of their employment. An officer's reputation for truth and veracity is critical to his/her ability to fulfill the responsibilities of the position. For this reason, an officer who knowingly and willfully falsifies a Department report becomes a liability. Indeed, such transgression can compromise an officer's ability to testify in court on behalf of the Department and the City's District Attorney, which is obviously an essential function of the job. As such, an officer who breaches this crucial bond of trust by intentionally making a false entry in a Department record or report can and should expect that serious discipline will follow.

The City, of course, bears the burden of proof here. Its responsibility is to establish through the weight of the credible evidence that Lupo is guilty of the charged offense. It must also demonstrate that the level of discipline imposed is appropriate. The Union, on other hand, bears no parallel burden. It need not disprove the charges against Lupo. Indeed, he is entitled to the presumption of innocence.

After a careful and thorough review of the record and the parties' respective arguments, I am convinced that the City has failed to meet its burden.[15] My reasons for this conclusion follow.

[15] As detailed above, the Union argues for the application of higher standard of proof here, such as beyond a reasonable doubt. I conclude that it is unnecessary to resolve this issue inasmuch as my review and evaluation of the evidence presented causes me to determine the City has failed to demonstrate that Lupo is

F Matter[16]

The charge against Lupo relating to the August 5, 2011 vehicle stop and arrest of F is rooted in the brief trunk inspection that he and M conducted during that investigation. Simply put, the City claims that by failing to notify M of that inspection and then initially denying it when questioned at F 's suppression hearing, Lupo is guilty of this charge.

On review, it is plain from the evidence presented that Lupo did not inform M of the trunk inspection for inclusion in his investigation report of the F matter. (City Exhibit 2.) Indeed, Lupo concedes as much.

The question to be answered then is whether by that failure, Lupo knowingly and willfully acted to render M investigation report false by its omission of a reference to the trunk inspection. I find the evidence insufficient to substantiate such intent.

On the record here, I am persuaded by Lupo's assertion that his failure to notify M of the trunk inspection was inadvertent. His assertion that it did not seem relevant at the time is certainly plausible. Indeed, as he testified without contradiction, his focus in communicating with M was on providing the factual details necessary to demonstrate probable cause to secure a search warrant for the vehicle. He also averred

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guilty of either charged violation of Department Disciplinary Code 1-§010-10, even when judged by the preponderance of the relevant evidence standard.

[16] I note that the charge against Lupo as to both the F and J matters is not the commission of a criminal act (e.g., perjury), which is a separately defined offense under the Department's Disciplinary Code. (Joint Exhibit 1.) Instead, the Department discharged him for violating Disciplinary Code Section 1-§010-10 by "knowingly and willfully making a false entry in any Department record or report." (Joint Exhibit 2.) Nonetheless, the City's evidence and arguments place considerable focus on Lupo's testimony at the hearings conducted in connection with the criminal charges brought against F and J . This focus leads to the issue raised by the Union; namely, whether the term "Department record or report," as used in Disciplinary Code Section 1-§010-10, can be construed as encompassing an officer's testimony in such a court proceeding. Ultimately, however, I conclude that it is unnecessary to resolve this issue, as I find insufficient evidence to conclude that Lupo knowingly and willfully gave false testimony at those hearings.

that supervisor M[redacted], who directed the trunk inspection, never instructed him to report that activity to M[redacted].

Lupo's testimony in this regard was clear and consistent. He did not waver on cross-examination. Further, no contrary testimony was presented that rebutted or undermined his account in this regard. In sum, I conclude that it should be credited.

I recognize that M[redacted], in his Internal Affairs interview, did report instructing Lupo to tell M[redacted] of the trunk inspection. (City Exhibit 1 & Union Exhibit 1.) M[redacted], however, did not testify at the hearing in this case. As for the transcript of his May 6, 2014 Internal Affairs interview, it is plainly hearsay. While hearsay is admissible in arbitration, it cannot, standing alone, be received for the truth of the matter asserted, particularly where it bears on a central issue in the case. Indeed, fundamental fairness dictates that the Union should have an opportunity to subject M[redacted] to the test of cross-examination before the credibility of his assertion can be considered. This principle applies with particular force where, as is true with M[redacted] assertion, there is a complete absence of independent corroborating evidence for the hearsay statement.[17]

Turning to Lupo's testimony at F[redacted] suppression hearing, I find his initial denial of the trunk inspection on cross-examination to be insufficient to establish the knowing and willful making of a false report. Stated otherwise, the record is lacking the

[17] Even if M[redacted] statement could be credited, I conclude that it falls short of the proof required to demonstrate that Lupo's failure to notify M[redacted] of the trunk inspection constituted willful concealment, as opposed to an inadvertent oversight. Weighing heavily in this decision is the absence of any evidence reflecting that Lupo had a motive to intentionally withhold this information from M[redacted]. To the contrary, as Thompson's investigation substantiated, the visual safety inspection of the trunk of F[redacted] vehicle did not violate Department policy, and therefore, the reporting of its occurrence to M[redacted] would not have reflected negatively on Lupo or M[redacted]. *See* note 13, *supra.* Further, if M[redacted] account is accepted, then it follows that Lupo had a strong incentive to notify M[redacted] of the trunk inspection. Indeed, by failing to do so, he would be disregarding the directive of a superior officer for which he would face potential discipline.

necessary proof to substantiate that this misstatement was not a simple mistake or memory lapse, but an intentional misrepresentation, as is required to establish that Lupo is guilty of violating Department Disciplinary Code Section 1-§010-10, as charged.

My review of the suppression-hearing transcript in the light of all the other evidence did not yield a basis to conclude that Lupo knowingly gave false testimony. Instead, as he averred here, the questions posed by F[redacted] attorney did reference the term "search." Thus, it is plausible, as he claims, that his denial concerned whether there had been a physical search of the trunk, as opposed to a brief visual inspection, before the arrival of the K-9 unit. Further, I note that when confronted with the security video, he readily confirmed the visual inspection of the trunk and the reason for doing so. The transcript of that testimony does not reflect any evasiveness by Lupo or any other indicia suggesting that his prior statement had been an intentional misrepresentation.

Also, I find no evidence that Lupo had any motive to intentionally give false testimony by denying the occurrence of the trunk inspection. To the contrary, as detailed above, the record substantiates that under the circumstances, the trunk inspection did not contravene any Department policy. *See* note 18, *supra.*

Further, an examination of Lupo's suppression-hearing testimony in the context of the surrounding circumstances lends support for his assertion that he did not even recall the trunk inspection until F[redacted] attorney exhibited the security video. Indeed, it stands unrebutted that at the time of the F[redacted] suppression hearing, Lupo was testifying in court with a high degree of frequency and limited preparation, which consisted of a same-day file review. The same was true as to the F[redacted] suppression hearing. Therefore, on the record here, I am compelled to credit Lupo's statement that when testifying on cross-

examination concerning the circumstances of the F[redacted] investigation, which had taken place more than two months prior, he simply forgot about the thirty second trunk inspection.

To conclude otherwise would require some additional direct or circumstantial evidence concerning his intent. I find none. Indeed, contrary to the City's claim, my review of the record does not substantiate that the trunk inspection necessarily left such a lasting impression on Lupo's memory that his denial of it at the suppression hearing must be deemed a knowing and willfully false statement. Rather, the evidence shows it was a very brief and inconsequential event in the course of a nearly two-hour investigation. It did not result in the discovery of any weapons or other contraband. Simply put, there was nothing particularly memorable about it.

J[redacted] Matter

Lupo's alleged violation of Department Disciplinary Code Section 1-§010-10 relating to the September 25, 2010 vehicle investigation concerns his reports and subsequent testimony averring that the windows of J[redacted]'s vehicle had limo tint. On a careful review of the record, I am convinced that the City has failed to offer sufficient direct or circumstantial evidence to substantiate that by virtue of such reports and testimony, Lupo is guilty of knowingly and willfully making a false entry in a Department record or report.

There is no genuine dispute that the vehicle at issue did not have limo-tinted windows at 5:15 p.m. on September 24, 2010, when it was rented on J[redacted] behalf from Avis. The same is true as to the condition of the vehicle upon its subsequent return to Avis. However, as the record demonstrates, this evidence is circumstantial and not

determinative of the issue here; namely, whether the vehicle had limo-tinted windows at 12:45 a.m. on September 25, 2010, when it became the subject of an investigation by Lupo and L[redacted].

Simply put, the condition of the automobile upon its release from and return to Avis does not preclude the possibility that during the interim, including as of the relevant time period here, temporary limo tint had been applied to the windows. As both L[redacted] and Lupo testified, without contradiction, on the basis of their experience, it is not uncommon for persons engaged in criminal activity to utilize rented vehicles to which they apply temporary window tint, so as to prevent police officers from observing illegal conduct occurring inside the automobile.[18] The application of temporary window tint to J[redacted] vehicle would have been consistent with this experience, as the investigation resulted in both J[redacted] and H[redacted] being arrested on narcotics charges.

The City's only first-hand evidence concerning the condition of J[redacted] automobile as of the relevant time period consists of L[redacted] testimony. On review, I find it to be inconclusive.

In both his Internal Affairs statement and his testimony here, L[redacted] reported being able to see into the vehicle through the side windows, which would be inconsistent with them being tinted at limo level. However, at the same time, he could not recall whether some lesser level of tint had been applied to the vehicle's windows. In fact, he acknowledged that his failure to observe H[redacted] upon initially approaching the vehicle might have been due, in part, to the windows being tinted.

[18] In reciting this experience, L[redacted] recalled supervisors alerting officers in the Department's 14th District to be aware of vehicles with heavily tinted windows because they were being used in robberies.

As such, his account of the vehicle's condition at the time of the investigation is insufficient to support a finding that Lupo's report of it as having limo-tinted windows was necessarily a knowingly false statement. Indeed, it leaves open the reasonable possibility that the windows were tinted at a level that Lupo, in the dark of night, mistook for limo tint.

The only other record evidence concerning this charge is Lupo's testimony, averring that consistent with his prior reports and testimony, the windows of J[redacted] vehicle did have limo tint at the time of the September 25, 2010 investigation. Notwithstanding the deficiencies that I have noted in the City's evidence, I am not compelled to accept this account at face value. Instead, it must be subjected to the same credibility assessment that would be conducted of any witness's testimony. In doing so, I conclude that it should be credited.

His account of the September 25, 2010 vehicle investigation, including, in particular, the level of tint on windows of J[redacted] automobile, was clear and consistent and did not vary from his contemporaneous reports and prior testimony. I recognized that he did amplify his description in one respect by noting that the window tint on the vehicle was a temporary, inexpensive do-it-yourself job. I find, however, his provision of this additional detail understandable. Here, in contrast to the circumstances that existed when he prepared his reports or testified in the hearings related to J[redacted] criminal case, the type of tint applied to the vehicle's windows (i.e., temporary) became a matter of considerable significance.

I also take note that the circumstances surrounding the September 25, 2010 vehicle investigation buttress the credibility of Lupo's account. It stands undisputed that

he and L[redacted] approached J[redacted] automobile solely because it was idling and appeared to be unoccupied. The limo-tinted windows, which Lupo did not observe until after the investigation had commenced, were strictly ancillary. As such, he did not have a motive to fabricate a report of limo-tinted windows in order to demonstrate probable cause for the investigation of J[redacted] vehicle.[19]

In sum, I conclude that neither the contemporaneous reports prepared by Lupo relative to the September 25, 2010 vehicle investigation, nor his subsequent testimony at the hearings in J[redacted] case, substantiate the charge that he knowingly and willfully made a false entry in a Department record or report.

Accordingly, for all these reasons, the Union's grievance is granted. In regard to remedy, I direct the City to promptly reinstate Lupo to his former position within the Department without loss of seniority. In addition, I instruct the Department to revise Lupo's personnel record to delete all references to his April 7, 2014 discharge to the maximum extent permitted under the governing law.

As to the matter of make whole relief, the City is directed to make payment to Lupo for all wages and benefits lost as a consequence of his discharge for the period from June 29, 2016 through the date of his reinstatement.

I decline to award Lupo back pay and benefits for the period from his April 17, 2014 discharge until the court's June 29, 2016 dismissal of the remaining charges then

[19] The Form 75-48A that Lupo completed does erroneously reflect that the J[redacted] vehicle was stopped for the windows having illegal limo tint. (City Exhibit 4.) Indeed, as detailed above, the September 25, 2010 investigation did not involve a vehicle stop for any reason. Instead, the investigation concerned a parked vehicle and was triggered by the fact that J[redacted] automobile was idling and appeared to be unoccupied. I do not understand, however, the City to claim that such entry constitutes the making of a knowingly and willfully false report. In any event, I am satisfied based upon Lupo's testimony that he made such entry, albeit in the wrong location on the form, to provide a complete account of this investigation and maintain a paper trail of all the related documents. As such, I cannot conclude that this entry substantiates a violation of Department Disciplinary Code Section 1-§010-10.

pending against him. In reaching this result, I take note of the City's contention that during this period, Lupo could not remain a member of the Department because of the criminal charges then pending against him. Notwithstanding the Union's contention that the Department could have continued Lupo in a modified assignment during this period, I do not consider the City's position to be unreasonable under the circumstances here, including, in particular, the nature of the charges then pending against him.

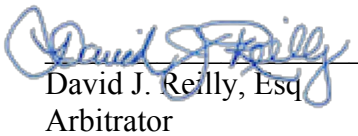
AWARD

1. The grievance is granted.

2. The City did not have just cause to discharge Steven Lupo, effective April 7, 2014

3. The City will promptly reinstate Steven Lupo to his former position within the Department without loss of seniority, and revise his personnel records to delete all reference to his April 7, 2014 discharge to the maximum extent permitted under the governing law. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge for the period from June 29, 2016 through the date of his reinstatement, less all outside wages and other earnings received by him as to this period. In connection with his reinstatement, Mr. Lupo will not be due any back pay or back benefits for the period from his April 7, 2014 discharge through June 28, 2016. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to Mr. Lupo based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

January 29, 2018

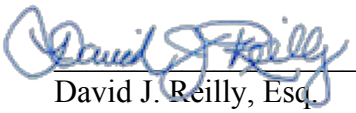


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

January 29, 2018



David J. Reilly, Esq.
Arbitrator